

World Intellectual Property Organisation (WIPO)

Second International Conference on Electronic Commerce and Intellectual Property

Geneva, September 19 to 21, 2001

MUSIC ONLINE WORKSHOP

“The Artist Online - Virtual Presence In the Real World”

Presentation by Mr. Ahti Vääntinen
New Media Adviser
International Federation of Musicians (FIM)

As a representative of the International Federation of Musicians (FIM), my task here is to bring a contribution of the music performer to the online music discussion. It's unfortunate that we didn't hear the representative of the Recording Artists Coalition from the U.S. on Wednesday, but I hope everyone can find the time to take a look at the interesting writing by Mr. Stone.

The general public has a seriously misguided picture of the music performers' profession. The whole profession is often judged by the tip of the iceberg, the most popular artists at a given moment in time. What is forgotten is the fact that for every mega-artist, there are thousands of professional music performers who may never be known to the masses, but may still make a living with their unique form of music.

The media presence of artists is very much guided by the requirements of promotion. It takes a special personality or exceptional circumstances or both to have an artist say in public that, for instance, “my record deal is a prison”, or that “all the royalties I've earned, have been recouped” or anything else along those lines. For promotion purposes, that wouldn't work, it wouldn't be “cool”.

To reflect what was said by Mr. Dixon of the IFPI, yes, we are the “creative people” he referred to, and we sometimes have to ask questions like “How do I get paid?” And we don't have to go anywhere near the Internet to hear these kind of questions from artists all around the world.

Why is this so? To answer this question is by no means the primary subject of my contribution today, but still I think it's valuable as a sort of background information.

For decades, the record industry has enjoyed the benefits of superior bargaining power in relation to individual artists. In time, this has led to a strikingly one-sided and unhealthy contractual culture where artists find themselves asking these very basic questions. At the initial stages of the online music business, the artist has all the more reasons for questions like this.

On to the online

The emergence of new business models and platforms is usually an active phase where many will engage in hope for fast profits. Some have already made their millions with online music, although the money most probably did not come from music-buying customers, but rather from venture capital investors and advertisers. We have also seen the first scenes of the probably unavoidable court battles in the middle of legal uncertainty and emerging business models and opportunities.

In general, music performers are welcoming legitimate uses of online music as a fresh opportunity for getting their art across to a wider public, with perhaps a hope for a little fewer middlemen than before. Some performers may be frustrated by the narrow chances to see any substantial income from record sales through traditional channels. If we look at music performers as a whole, record royalties are in fact not a very significant source of income. Of course there are well-known exceptions, but despite of their heavy presence in the media, they are, as I said the tip of the iceberg. Therefore, it is perfectly understandable that performers hope for a more motivating share of the potential online profits.

Distribution Control

Traditionally, the record industry has relied heavily on the ability to control the distribution of tangible copies, such as CD's. This has given the industry a definitive upper hand in dealing with artists as well. In order to achieve mass distribution, an artist has to give up a lot of rights and freedom in the recording contract. It's not surprising that artists and their organisations have accused the industry of unfair practices and violations of labor laws etc. However, the sense of control seems to be gradually growing weaker with the increase of piracy, as we heard from Mr. Dixon, and the emergence of affordable consumer devices capable of making identical copies of records.

If we look at what individual artists are doing, we can see that even many prominent artists have chosen to reject the general approach of the recording industry as regards online music. I'm not saying this is the way to go, but the logic of the artists seems to have its merits. Some of them seem to be prepared to sacrifice the potential online royalty income through record companies. They seem to value more the freedom to interact directly with their fans and web communities, even if it means at this stage, for example, giving the music for free. Recalling the online contribution of Mr. Davis on Wednesday, his suggestions and ideas did not sound so very different from those coming from artists who are at the moment involved in various online experiments.

The benefits of online distribution

Now, what are the benefits of online distribution and who's getting the benefits?

Online distribution is ecologically sound, cost-effective, worldwide and direct. Eventually, it will hopefully also be fast and it is expected to give consumers a choice

of practically all recorded repertoire in the world, to get just the song they want from an artist they like.

Cost-effectiveness and efficiency in the online business comes not only from being able to get rid of the cost of manufacturing and logistics. Online delivery makes it also possible to release material to a smaller audience in the first place. It also allows for the material to be online for as long as there is a suitable information network in place. The commercial lifespan of any recording - not just the hits or evergreens - is practically without limits, because there is no real reason to remove a song from an online repertoire. Once a music file is placed on a media server, the cost of keeping it there available to the public, is almost non-existent. Many of the costs previously borne by the record company are paid by the consumer, such as Internet connection and blank media costs.

The differences businesswise between selling records and online music are remarkable. The old business model can maybe, at least to some extent, be used to justify the notoriously low real-life royalties artists are getting from record sales. But when we enter the radically different cost structure of online sales, it should have a profound effect on the contracts between artists and companies.

Visions and realities

The first online music seminar I attended in Los Angeles by the World Research Group in 1996 was a fireworks of ideas and revolutionary visions of how the whole business of music would change almost overnight, how record companies would become obsolete and how artists would build their own online fanbases and web communities. The use and general knowledge of the Internet was on a considerably lower level then, and the first “working” versions of streaming audio were just made available. Internet was changing from a text-based specialist resource into a multimedia platform for the masses. Five years on Internet time is a very long time, indeed.

It is more than obvious that a lot of those visions of five years ago have not come true, and they may not come true for some time, or ever, for that matter. But some of the ideas have survived and developed, if nothing else, at least a sense of optimism among music performers.

Many artists simply want to concentrate their energy fully to the creative work, and there's absolutely nothing wrong with that. An increasing number of artists, however, is becoming aware of the need to create and maintain a web presence of their own, independently of, for example, a record company. Of course, all promotional efforts should be properly coordinated, but during the whole of an artist's career, there may well be contracts with more than one record company. When a contract period is over, company A could be more than reluctant to turn over an artist site with an active community around it to company B, or to the artists. So, we urge artists to maintain, if possible, a web presence of their own. In the long run, it may prove extremely valuable.

Modalities of Online Music

Before a critical mass of consumers have in their hands easy-to-use tools to enjoy music with essentially at least the same degree of freedom and control they are already used to having before, it is hard to believe in any significant success for online music. I'm not a pessimist, I just try to be realistic. There are other modalities of online music trade, such as streaming, music in mobile applications etc., and they may well provide alternatives for the traditional model where consumers expect to "own" something when they purchase music.

I was attending an online music seminar in Seoul, South Korea a year ago when I took a walk at the Yongsan Electronics Market there. I noticed there were several makes and models of MP3 players available. When I asked one of the salesmen where I could get music for these devices, he smiled happily and said in a very honest and enthusiastic manner: "The Internet. It's all free. You have everything there."

The words of the salesman tell us at least three things.

First, the level of protection provided by copyright legislation varies in different parts of the world, and the variation is even greater if we look at the respect of the general public for that legislation. I imagine we would get a similar response from many other parts of the world. The right to download seems almost like an inalienable right.

Second, there is obviously a market developing, but at least for now, it's driven by hardware manufacturers, not really by legitimate music content providers, record companies or artists.

Third, I was told that in South Korea there were 20 million internet connections of which 3 million were ADSL in October last year. So when the salesman said "you have everything there", it was true on a very practical level. Music was easily and instantly accessible for the general public with a sufficient consumer bandwidth. I was also told that already at that time, 5 % of South Korean music sales took place online.

Rapid technological advances come up with ever tightening compression with very little or practically no loss of audio quality, and also brand new audio formats. On the other hand, there is a development to the opposite direction. As described by Mr. Dixon, we have the competing disc formats Super Audio CD and DVD Audio that aim to establish a higher standard for audio. However, the consumer will have the final say as to which audio format will survive and which will not. With CD, MiniDisc, Super Audio CD, DVD Audio, MP3, Liquid Audio, WMT etc. we may just have to get used to living with co-existing multiple audio formats and scalable quality. I'm sure music performers have nothing against technology and the options it provides for the consumer, as long as the consumer doesn't feel too puzzled about the new devices and formats. After all, listening to music performances is what it's all about.

Technical protection

Technical protection measures of digital content are a big issue for the industry and legislators as well. Where do music performers stand as regards technical protection?

In general, performers have a common interest with the whole of the music industry to have technical measures, once they are used, effectively protected by legislation. However, legislation must not go into the details of how or how effectively such protection should be arranged, nor should it require that any technical measures must be used in the first place in order for the music or other content to be protected by law. Artists and record companies, too, I believe, want to maintain a freedom of choice. Sometimes it may not be practical or economically wise to restrict consumer use of a specific music product by any protective technical measures. But that cannot mean that the content as such does not deserve copyright protection.

As long as technical protection measures are used to prevent unauthorized use of music, we are on the right track. But if protection measures should become a means for someone to, in fact, control electronic distribution in a way that interferes with free competition or is in the position to limit someone else's free or equal access to the online market, the online future does not look very bright for the performer.

There are different approaches to the extremely complex problem of technical protection. The complexities were analyzed on Wednesday by Mr. Davis. One approach is to cover the whole chain from the production master to the consumer media and consumer devices with protective measures. This rather ambitious approach obviously taken by the Secure Digital Media Initiative (SDMI), for example, is definitely up for some big challenges. How to convince the consumer that the unavoidable inconveniences and added cost attached to these new technologies of consuming music are a good thing? Music already submits very flexibly to every imaginable way or environment one might want to listen to it in. If this sense of "consumer ownership" of music - no matter how false it may be on purely legal terms - is to be diminished, how could the public see it as something positive? Another challenge is that in order for such a system to be effective, alternative sources of acquiring the music would have to be cut off. This would mean, for example, the end of the CD as it is now, an unprotected source. As long as consumers have their general purpose PC's and the Internet, this approach may well be a lost cause.

To take an example of a more streamlined approach, it could be just to watermark or fingerprint a music file in a way that the source of any illegal use could be reasonably well tracked down later, if necessary. Combined with reasonable pricing, removing these identifiers would probably be too much trouble for the average consumer.

The Impact of Self-Production.

The issue of self-production has been taken up by performers' organisations not only because of the obvious implications on rights issues, but also because self-production is an important part of preserving and creating cultural diversity.

Music performers have been engaged in the actual production of their performances or recordings for as long as such production has existed. As performing artists go, it

can be seen as a manifestation of the artist's constant strive for artistic freedom. In most cases, however, artistic and economic freedom seem to go hand in hand.

The need for capital investment in the production of music recordings has clearly decreased with affordable digital audio technology. At the same time, the request by record companies to get all rights from performers in return for their production investment may be losing credibility. Of course, there's marketing and promotion, distribution and a number of other things that record companies take care of, but still, in the online market, I think nobody can afford to take any of the old structures of the business for granted.

Analog contracts in the digital world

A traditional contractual approach is that a record company gives an artist a royalty advance to produce the master recording. However, if we take an objective look at the situation, it would make more economic sense for the artist to walk to the nearest bank to get a loan for production. When the loan is paid back, the rights would still be owned by the artist, as opposed to how things work with record contracts: all rights remain property of the company. In the online music market it makes all the difference in the world for performers to possess the rights to begin with. Then, they can, hopefully, start to bargain for the best deals in the rights market.

For some time, existing contracts will, of course, bind a great number of recording artists to quite, should I say, modest shares of the profits of the business. Due to so-called new technology clauses, royalty percentages may even be lower as regards online sales than with CD sales.

Recording contracts as they are today, generally fall into three categories as regards online uses of the recordings. In the first category, the company gets full rights to online uses. This is either directly expressed in the contract language or it can be otherwise understood from it without reasonable doubt. In the second category, the right of the record company to use the material online is unclear. Typically, provisions to support either view can be found in the contract. The third category is contracts that clearly only deal with the production and sale of tangible records. In this category, artists have a chance of negotiating the terms of online use separately. Of course, that doesn't change what I said earlier about bargaining power, but at least there is even a slight chance of getting acceptable terms for online uses.

In Finland, the Musicians Union started negotiating collective agreements for studio musicians already in the 1940's. When the agreement was bound to be renewed again last year, we took up the issue of online rights with the Finnish IFPI. As a result of those negotiations, the Union secured an additional compensation for online rights on the basis that these rights had not yet been transferred to the producers in earlier collective agreements. The economic value of the online compensation was not remarkable, as the market is still undeveloped, but it was very important in principle. First, the trade organisation representing music performers secured the position that any rights that have not been transferred, can be successfully claimed, even though the general trend worldwide seems to be to automatically assume that record companies possess the rights to put music online.

The reason I took up this example was to point out that trade organisations are essential in protecting the rights of music performers. The same is true with performers'collecting organisations where appropriate legislation is in place in order for them to operate effectively. If it wasn't for these organisations, there would be no rights whatsoever to defend.

There is, luckily, also a trend towards a more even sharing of profits, which is driven, among other things, by the new online "record" companies. These companies often offer artists a 50/50 deal to begin with. This development is partly a result of increasing self-production, and probably some genuine new thinking as online business models develop, and to some extent, of course, it is due to the struggle of these new companies to sign artists.

Effective promotion on the web - and anywhere - usually requires a lot of money and effort. However, many of the online music services operating on the web today give artists a seriously misleading picture of their resources, possibilities and real intentions as regards artist promotion. The greater number of artists and repertoire a service has to offer, the smaller the chances to promote any one of them effectively. In fact, the only way to stand out from the crowd in a massive web service is eventually money. You pay for visibility. And there we go again, back to the real world.

Is there a future for Copyright on the Internet?

The Web as we know it today is a mirror of the human society. It contains a lot of what we think is good and useful as well as many things that are considered bad or destructive. For the governments, it's at least as difficult to control the cyberspace as the real world, which, of course, is already often impossible to control.

When we speak of online music, we are not actually speaking of the music itself but we are actually referring to the "online" part. This is an important notion. The music as such is legally as protected as ever.

Despite of the fact, that as Mr. Davis put it, "it's already out there", we shouldn't just accept the notion that "it's too late". On the contrary, from the rightsholders point of view it is far too early to draw too pessimistic conclusions. As we have seen, a single court decision may turn the table and change the attitudes of the players. As long as there is the slightest chance of getting of the problems solved, the whole copyright community should focus on these issues in order to find balanced practical and legal solutions that will reasonably protect creative talent and investment in the online world.